

WILLIAM J. SCHWEISS

IBLA 94-1, 94-201

Decided March 31, 1997

Appeals from a Decision of the California State Office, Bureau of Land Management, affirming issuance of a notice of noncompliance with respect to operations on Moss Mill millsite CAMC 68120 (IBLA 94-1), and a Decision in Contest CACA 26801 by Administrative Law Judge Ramon M. Child finding that the contestees' use and occupancy of the millsite was unauthorized and should cease (IBLA 94-201).

Decisions affirmed.

1. Federal Land Policy and Management Act of 1976: Surface Management–Millsites: Generally–Mining Claims: Surface Uses

A notice of noncompliance issued under 43 C.F.R. § 3809.3-2(d) will be affirmed when the use and occupancy of the claimant violates a state code and constitutes undue or unnecessary degradation.

2. Millsites: Determination of Validity–Millsites: Independent–Mining Claims: Millsites–Rules of Practice: Appeals: Burden of Proof

When the Government presents evidence that a millsite is not being used or occupied for mining or milling purposes, and the claimant fails to refute that evidence, the Board will affirm the Administrative Law Judge's decision that the millsite does not qualify as an independent millsite pursuant to 30 U.S.C. § 42 (1994).

APPEARANCES: William Schweiss, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

William J. Schweiss has appealed from the July 16, 1993, Decision of the California State Office, Bureau of Land Management (BLM), affirming the April 2, 1992, notice of noncompliance (NON) issued by BLM's Barstow Area Manager in connection with Schweiss' operations on the Moss Mill millsite located in the NW¼, sec. 12, T. 3 N., R. 3 W., San Bernardino Meridian, San Bernardino County, California. Schweiss has also appealed from the October 29, 1993, Decision in Contest CACA 26801 by Administrative Law

Judge Ramon M. Child finding that under 30 U.S.C. § 42 (1994) the contestees' use and occupancy of the millsite claim was not in good faith for mining or milling purposes and should cease. Because these appeals arose from the same set of facts, they are consolidated for the Board's review.

The record indicates the millsite was located by William J. Schweiss and his brother, John Corbett Schweiss, on April 7, 1980. However, John Schweiss left the site in 1985 but has not formally relinquished his interest in the property. (Ex. U.S.-2, at 5.) Thus, both brothers are listed as contestees in the contest, but only William Schweiss is the Appellant in both appeals.

#### Notice of Noncompliance

On July 11, 1985, William J. Schweiss filed a plan of operations under 43 C.F.R. § 3809 to establish a custom mill, projecting that the mill would be operational between 1987 and 1990. On October 11, 1985, BLM approved the plan of operations subject to certain stipulations. At the request of BLM, the Environmental Health Services (EHS), County of San Bernardino, inspected the millsite on January 25, 1988. By letter of February 3, 1988, EHS informed BLM that the two structures on the property that were being used for human habitation were found to be substandard as described in the California Health and Safety Code § 17920.3, Substandard Building Conditions, and EHS provided a list of specific deficiencies in its letter of March 11, 1988. (Ex. U.S.-15.)

By letter dated April 2, 1992, the Area Manager issued Schweiss a NON in which he directed Schweiss to furnish a \$3,600 reclamation bond for operations on the millsite. Based on EHS' letters citing violations of California Health and Safety Code § 17920.3, the Area Manager stated that Schweiss was in noncompliance with 43 C.F.R. § 3809.3-1 for conducting operations contrary to State law. Additionally, the Area Manager found him to be in violation of 43 C.F.R. § 3809.3-5, which requires the operator to maintain his structures, equipment, and other facilities in a safe and orderly manner. Furthermore, the Area Manager considered his occupancy and use of the structures to be unnecessary or undue degradation as defined by 43 C.F.R. § 3809.0-5(k). Noting the pendency of Contest No. CACA 26801, relating to Schweiss' occupancy of the millsite, the Area Manager determined that Appellant must still comply with sanitation laws and supply a reclamation bond, the amount of which would be diminished if Appellant removed certain structures himself. By Decision dated July 16, 1993, the State Director affirmed the Area Manager's Decision.

Schweiss filed a Notice of Appeal and a Petition for Stay. By Order dated October 20, 1993, the Board denied the Petition. Subsequently, Schweiss filed a Petition for Reconsideration of our denial, which was denied by the Board's Order of January 12, 1994.

In his Brief in Support of Appeal, Schweiss asserts that the State Director's Decision, the April 2, 1992, NON's and reference to an earlier December 12, 1989, letter of noncompliance are in error for citing

violations of 43 C.F.R. Subpart 8365. Quoting 43 C.F.R. § 8000.0-1, Schweiss points out that the regulations in this subchapter deal with the administration of recreation programs on public lands, while his millsite is authorized under 43 C.F.R. Subpart 3809. Citing several other BLM decisions which he feels are in error, Schweiss asserts that BLM "should be estopped from harassing appellant with adverse decisions."

[1] As to Schweiss' argument that BLM incorrectly cited regulations in 43 C.F.R. Subpart 8365 as authority, 43 C.F.R. § 8365.0-1 states in part that the purpose of Subpart 8365 is to "set forth rules of conduct for the protection of public lands and resources." (Emphasis added.) Furthermore, 43 C.F.R. § 8365.1 provides that "[t]he rules in this subsection shall apply to use and occupancy of all public lands under the jurisdiction of [BLM]." (Emphasis added.) Clearly, the lands embraced by Schweiss' millsite claim are public lands under the jurisdiction of BLM; the regulations in 43 C.F.R. Subpart 8365 are therefore applicable.

In managing the public lands, the Secretary of the Interior is mandated by law to "take any action necessary to prevent unnecessary or undue degradation of the lands." Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1994); see B.K. Lowndes, 113 IBLA 321 (1990). The surface management regulations of 43 C.F.R. Subpart 3809 were promulgated pursuant to this authority. Differential Energy, Inc., 99 IBLA 225 (1987). Pursuant to the above authority, BLM monitored Schweiss' activities on the millsite claim and found that he was in violation of 43 C.F.R. § 3809.3-1 for conducting operations contrary to State law. This violation was well-documented by a list of specific deficiencies in plumbing, heating, natural light, ventilation, room and space dimensions, improper maintenance, and sewage disposal which caused the county to find that two structures on the site used for human habitation were substandard as described in California Health and Safety Code § 17920.3.

The BLM also found that Schweiss was in noncompliance with 43 C.F.R. § 3809.3-5 which requires the operator to maintain his structures, equipment, and other facilities in a safe and orderly manner. The BLM noted that due to lack of proper ventilation and the general dilapidated condition of the structures, they cannot be considered safe and orderly. The BLM further stated that due to the dilapidated and substandard condition of the buildings, and inadequate room space and dimensions of the dwellings, upgrading of the sanitary facilities, heating, lighting, and ventilation alone will not remedy the situation. Therefore, BLM considered his use and occupancy of these structures to be unnecessary and undue degradation within the meaning of 43 C.F.R. § 3809.0-5(k). Based on the existence of these violations, BLM issued a NON pursuant to 43 C.F.R. § 3809.3-2(d).

The burden of proof is on the appellant to show error in the decision appealed; if the appellant fails to demonstrate error, the decision will be affirmed. Fred Wilkinson, 135 IBLA 24, 26 (1996); Wells J. Horvereid, 88 IBLA 345 (1985). In B.K. Lowndes, 113 IBLA at 325, we held that when a party appeals a BLM decision affirming a NON under 43 C.F.R. § 3809.3-2,

it is the obligation of the appellant to show that the determination is incorrect. Unless a statement of reasons shows adequate basis for appeal and appellant's allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration. Howard J. Hunt, 80 IBLA 396 (1984). Where BLM determines that the surface disturbance caused by appellants' millsites had caused unnecessary or undue degradation of the lands, and appellants challenge that determination, the burden is on appellants to show that the situation does not exist.

Applying the above standards to the case at hand, Schweiss has failed to show error in the issuance of the NON. Accordingly, Schweiss has failed to meet his burden of proof, and the State Director's Decision of July 16, 1993, must be affirmed.

#### Contest CACA 26801

Subsequent to a number of field examinations, BLM Geologist K.C. Schulte prepared a mineral report dated August 21, 1990, in which he concluded that "[t]he residential occupancy of the [mill]site by Mr. Schweiss, and placement of associated non-mining improvements and material within the area of the Moss Mill, is not related to mining or milling operations, or uses reasonably incident thereto." (Ex. U.S.-2, at 1.) Instead, Shulte concluded that Schweiss was using the site as a residence and for stripping and repairing vehicles, and found that the living quarters were in violation of the State code pertaining to substandard building conditions.

Based on the recommendation of the mineral report, BLM issued a contest complaint on February 20, 1991, charging that Schweiss' occupancy of the millsite constituted unnecessary and undue degradation, and was unauthorized. Schweiss filed a Motion for Summary Dismissal of the complaint alleging that the complaint did not meet the requirements of the regulations and the BLM Manual. By Order dated December 31, 1991, Administrative Law Judge Harvey C. Sweitzer denied the Motion for Summary Dismissal, but stated that the Motion should be treated as an answer with a general denial of the allegations of the complaint.

A hearing was scheduled for June 21, 1993, at 9:30 a.m. in San Bernardino, California. Notice of the hearing was issued April 5, 1993, and the return receipt card in the case file shows that Schweiss received the Notice on April 13, 1993. By Notice dated May 12, 1993, Schweiss was further advised of the exact address of the building where the hearing would take place, including the floor and the courtroom, and also the time and date of the hearing. Schweiss acknowledged receipt of this information on May 27, 1993.

Schweiss did not appear at the hearing. Subsequently, on July 6, 1993, Schweiss filed a Postponement Motion requesting that the June 21, 1993, hearing be postponed, explaining that he did not arrive at the hearing until 3:15 p.m. because the car he was borrowing to drive to the hearing was not released to him until 12:30 p.m. By Order dated July 7, 1993, Judge Child denied the Motion.

On October 29, 1993, Judge Child issued his Decision, which included the following primary findings of fact and conclusions of law:

Findings of Fact

3. William Schweiss has failed to use and occupy the millsite in good faith for any milling or mining purpose.
4. William Schweiss' use of the cabin, spring house, and fencing is causing unnecessary and undue degradation.
5. William Schweiss' use and occupancy of the millsite claim for entertaining and housing friends and for stripping vehicles is causing unnecessary and undue degradation.

Conclusions of Law

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4. John Schweiss' failure to answer the Complaint constitutes an admission that his use and occupancy of the millsite claim is unauthorized because (1) it causes unnecessary and undue degradation and (2) it is not in good faith for any milling or mining purpose.
5. Because William Schweiss' use of the cabin, spring house, and fencing is causing unnecessary and undue degradation, such use is unauthorized and should cease.
6. Because William Schweiss' use and occupancy of the millsite claim for entertaining and housing friends and for stripping vehicles is causing unnecessary and undue degradation, such use and occupancy is unauthorized and should cease.
7. Because both contestees have failed to use and occupy the millsite claim in good faith for any milling or mining purpose, all of their use and occupancy of the claim is unauthorized and should cease.

On appeal, Schweiss filed a Petition for Stay which was denied by the Board's Order of January 12, 1994; he later filed a Petition for Reconsideration of that denial which we denied by Order dated May 6, 1994. Schweiss also filed a Motion to remand both of his appeals to the Inspector General for investigation; this Motion was denied by our Order of May 3, 1994.

In his reasons for appeal, Schweiss refers to his Motion for Declaratory Judgement filed August 9, 1993, to dismiss the contest complaint which was not ruled upon by the Judge. In that Motion, Schweiss claimed that "BLM is attempting to bootstrap an occupancy complaint into a validity contest" and that "[t]he holding of the Department in Doherty [United States v. Doherty, 125 IBLA 296 (1993)] specifically bars such actions."

Appellant asserts that his posthearing brief included objections to evidence presented by BLM at the hearing on which Judge Child did not rule. Schweiss refers to 43 C.F.R. § 4.452-6(b) which provides that objections to evidence will be ruled upon by the Administrative Law Judge. He also filed a Motion for Official Notice with the posthearing brief which was not ruled on by the Judge as provided for in 43 C.F.R. § 4.24. Appellant asserts that his June 29, 1993, Postponement Motion, which was denied by Judge Child, presented evidence that BLM's complaint violated the Administrative Procedure Act. Schweiss argues that his Motion for a prehearing conference was not ruled on. Finally, he argues that he was given a change of judges and that the Government did not regain jurisdiction after the change.

[2] Schweiss's reliance on U.S. v. Doherty, *supra*, is misplaced. In Doherty, we affirmed Administrative Law Judge Sweitzer's conclusion that the "the contestee's use and occupancy of the claim is reasonably incident to his mining activities." Id. at 299. This conclusion was based in part on Judge Sweitzer's finding that there was no evidence that the cabin on the claim had been used as a residence for purposes other than those related to mining during times of mining activity. Id. In the case at hand, there is ample evidence to support the conclusion that Schweiss' residential occupancy and placement of nonmining improvements within the site are not related to mining or milling operations. See Ex. U.S.-2.

We find that BLM has presented evidence that Schweiss' millsite is not being used for mining and milling purposes, and that Schweiss has failed to refute that evidence. Thus, we conclude that the millsite does not qualify as an independent millsite pursuant to 30 U.S.C. § 42 (1994), and that Judge Child's Decision must be affirmed. See United States v. Loyall Fraker, 122 IBLA 24 (1992).

To the extent Schweiss has raised arguments in either appeal not specifically addressed herein, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed.

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John H. Kelly  
Administrative Judge

I concur.

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Will A. Irwin  
Administrative Judge

